IN THE

Supreme Court of the United States

OCTOBER TERM, 1922, No. 99.

(Was No. 372, October Term, 1921.)

BALTIMORE & OHIO RAILROAD COMPANY,
Appellant,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

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(28,327)

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STATEMENT.

The cause herein comes to this court on appeal from the Court of Claims.

On September 22, 1919, appellant filed in the Internal Revenue Bureau a claim for refund of stamp taxes erroneously or illegally collected from it by the United States, upon the proper form of the Bureau of Internal Revenue in the amount of

$55,158.00 for the recovery of said amount paid by appellant to the United States as stamp taxes on a certain list of deeds thirteen in number, given October 1, 1915, by its subsidiary companies to appellant. Said deeds were given without any valuable consideration passing from the subsidiary companies to the parent company, your appellant. The said deeds were prepared for a nominal consideration to complete transfer of title from the subsidiary companies to the parent company to meet urgent operative needs of the latter and for the purpose of enabling appellant to mortgage its entire property. This could only be accomplished by having the legal title of the subsidiary companies vested in the parent company, your appellant, and not through control of said subsidiary companies by appellant's ownership in stocks and bonds and operation. Appellant based its claim for refund upon the ruling of the Acting Commissioner of Internal Revenue, dated April 18, 1919, which is in part as follows:

> "You are advised that the deeds of conveyance in question are not subject to stamp tax under subdivision 7, Schedule A, Act of 1918, provided that no valuable consideration passed from the grantee to the grantor."

Under the aforesaid ruling of the Commissioner of Internal Revenue the deeds are not subject to stamp taxes, "where a parent corporation decided to dissolve some of its subsidiaries and to take over their real property, deeds of conveyance having

been prepared for a nominal consideration, no actual consideration passing to the subsidiary companies."

Attached to petitioner's claim for refund were the thirteen original deeds with canceled stamps affixed thereto and were a part of the claim for refund.

The Commissioner of Internal Revenue rejected the claim for refund under date of October 2, 1919, on the ground that the stamps in question having been purchased in 1915 are barred from redemption by the two years' limitation imposed by the Act of May 12, 1900 (31 Stat., 177).

Upon hearing held before the Solicitor and Commissioner of Internal Revenue, which was subsequent to the rejection of the refund claim, appellant called to the attention of each of the said officers its informal claim for abatement filed by it under date of February 11, 1915, in which it specifically set forth in detail three of the deeds of conveyance listed in its claim for refund. Each of said tendered deeds contained only a nominal consideration and conveyed property of each of the subsidiary corporations to the parent corporation. In said informal claim for abatement it is stated that no stamp tax should apply to these deeds under the Act of October 22, 1914 (38 Stat., 745), and asked for a ruling of the Commissioner of Internal Revenue. The Commissioner of Internal Revenue by letter to appellant under date of February 25, 1915, rejected the informal claim for abatement

and held that the stamp tax applied. Under said rejection by the Commissioner of Internal Revenue appellant had no other alternative but to pay the stamp taxes on the thirteen deeds, which it did.

Appellant contended in a hearing before the Commissioner of Internal Revenue that its informal claim for abatement had been properly amended and perfected and duly presented under the Internal Revenue laws and the regulations of the Bureau of Internal Revenue and therefore its claim for refund of the stamp taxes erroneously or illegally paid should be made to appellant. Relief was denied appellant.

Appellant brought suit in the Court of Claims for the refund of the stamp taxes and demurrer being filed by appellee to appellant's petition the demurrer was argued before the court and a written opinion was handed down by the court dismissing appellant's petition.

SPECIFICATION OF ERRORS.

1. The appellant claims that the Court of Claims erred in sustaining the defendant's demurrer as the petition does state facts sufficient to constitute a cause of action and said cause of action is within the jurisdiction of the court.

2. The court erred in holding that the facts do not constitute a claim for abatement or refund of taxes and that it was necessary to file a second claim for abatement of the taxes, for the law and regulations governing the filing of Internal Rev-

enue claims for abatement and refund of taxes and the practice before the Internal Revenue Bureau regarding same do not require the filing of a second claim for abatement where a claim is already on file whether it be formal or informal.

3. The court erred in its application of part of Section 3226 of the Revised Statutes and also in its application of the Act of May 12, 1900, 31 Stat., 177, as amended by the Act of June 30, 1902, 32 Stat., 506, as said acts have no application whatsoever to the facts alleged in the petition of the appellant as the appellant complied with Section 3226 in the filing of its suit for refund of stamp taxes and the statute of limitations as applied by the court under the Act of May 12, 1900 (31 Stat., 177), has no application to this case as the statute is no bar to the present suit.

4. The court erred in deciding that the informal claim for abatement could not be amended by the claim for refund, for the Internal Revenue laws and regulations governing the case admit of such amendment.

BRIEF.

ARGUMENT.

POINT 1.

COURT OF CLAIMS ERRED IN SUSTAINING DEMURRER.

We shall first address ourselves to the decision of the Court of Claims and point out in more detail what we consider the errors of that court in its decision.

The court said:

> "The plaintiff company having some doubt as to the application of the stamp act of October 22, 1914 (38 Stat., 745), to the transaction applied to the Commissioner of Internal Revenue for a ruling thereon at the time exhibiting three only of said deeds. The Commissioner held adversely to this contention, and acquiescing therein the plaintiff company without protest affixed to each of said deeds the requisite amount of stamps, totaling the sum now sued for." (Rec., p. 5.)

We respectfully call to the court's attention that the Court of Claims erred in not stating that a protest had been filed against the imposition of the stamp tax for appellant alleged in its petition as follows:

> "Upon hearing held before the Solicitor of Internal Revenue, and also personally

before the Commissioner of Internal Revenue, your petitioner called to the attention of each of the said officers its informal claim in abatement filed by it under date of February 11, 1915, in the Bureau of Internal Revenue, in which it specifically set forth in detail three of the deeds of conveyance listed in its claim for refund as follows:

> Mahoning Valley Western R. R. Co.
> Akron & Chicago Junction R. R. Co.
> Central Ohio R. R. Co.

> "Each of said tendered deeds contained only a nominal consideration and conveyed property of each of the subsidiary corporations to the parent corporation. Said informal claim in abatement stated that no stamp tax should apply to these tendered deeds and asked for a ruling of the Commissioner of Internal Revenue."

The informal claim in abatement of your petitioner filed with the Commissioner of Internal Revenue as shown by the petition (Rec., p. 2) is a plain protest against the imposition of the stamp taxes in question. If your petitioner believed that the stamp taxes were due the Government, there never would have been any necessity for the informal claim in abatement. Had it been on the regular form prescribed by the Bureau of Internal Revenue for a claim for abatement of taxes it could not have been more clearly shown and the protest made with more emphasis than was set forth in the informal claim for abatement. An examination of

the regular form of a claim for abatement (Form 47) issued by the Bureau of Internal Revenue will show the following:

> "Deponent verily believes that the amount stated in item 4 should be abated and claimant now asks and demands abatement of said amount for the following reasons."

The reasons are then set forth.

In the informal claim submitted by your appellant on February 11, 1915, the facts in the three transactions were set forth and the specific statement made that no stamp tax should apply. While set forth in an informal manner the Bureau of Internal Revenue recognized the informal claim by making reply to it under date of February 25, 1915, and holding that the deeds in question were taxable under the Revenue Act of October 22, 1914. Petitioner in its said informal claim in abatement asked the forbearance of the Commissioner of Internal Revenue by its protest against the imposition of said tax. And in doing that, there at once came into being an informal claim containing all the characteristics of a claim as defined by this court in the following language:

> "It is, in a just juridical sense, a demand of some matter as of right made by one person upon another to do or forbear to do some act or thing as a matter of duty. A more limited but at the same time an equally expressive definition was given by Lord Dyer, as cited in Stowel *vs.* Zouch Plowd, 359, and

it is equally applicable to the present case; that a claim is a challenge by a man of the propriety or ownership of a thing, which he has not in possession, but which is wrongfully detained from him."

Prigg *vs.* Pennsylvania, 16 Peters, 539.

In view of the aforesaid authoritative definition by this Court it cannot be denied that when it was stated in petitioner's informal claim in abatement that no stamp taxes should apply that a demand was at once made which was a challenge to the United States of its ownership or right to the money involved in the stamp taxes which the Bureau of Internal Revenue subsequently held must be paid. Unquestionably there was, and in view of that situation, under the doctrine laid down in the Prigg's case by this court, a claim had come into being on behalf of the Baltimore and Ohio Railroad Company against the United States. We do not for one moment contend that that claim in its first inception was a formal one, for it would have had to be made on the regular form (Form 47) prescribed by the Bureau of Internal Revenue for the abatement of taxes erroneously or illegally assessed. It was, however, an informal claim capable of being perfected and amended, for the Attorney General, in 14th Opinions of the Attorney General, at page 615, states:

"An application filed with the Commissioner of Internal Revenue for the refund-

> ing of taxes alleged to have been erroneously or illegally assessed and collected, though informal or defective, may nevertheless be regarded as a 'claim' within the meaning of section 44 of the act of June 6, 1872, chapter 315, so far at least, as to be the foundation for an amendment."

And continuing:

> "Whenever a *bona fide* litigant or claimant brings his case before a tribunal having jurisdiction, I apprehend that such proceeding, even when 'fatally' informal, is usually held to be an action or claim, so far at least as to be a foundation for an amendment, and thus to be capable of becoming perfect by relation to its original institution, and so defeating a plea of 'limitation' (say) which otherwise might avail the defendant."

The court will respectfully note that section 44 of the act of June 6, 1872, chapter 315, is section 3228 of the Revised Statutes.

That the Commissioner of Internal Revenue has followed the above ruling of the Attorney General would appear by Regulations No. 14, Revised:

Instructions

Concerning the

Abatement and the Refunding of

Taxes and Penalties

Which Are Uncollectible, Abatable, or Refundable under the Provisions of Sections 3220 and 3221, Revised Statutes, Section 6, Act of March 1, 1879, or Other Acts.

and

The Redemption of or Allowance for Internal Revenue Stamps under the Provisions of the Act of May 12, 1900, as Amended by the Act of June 30, 1902.

On page 28 of said regulations, under "Statutes of Limitation," is stated:

> "All claims for the refunding of taxes or for the redemption of stamps presented to the collector for transmission to this office should be received and forwarded, notwithstanding the fact that in the opinion of the collector they may be barred by the statute of limitation. It frequently happens that while the formal application is not presented within two years, the taxpayer has applied by letter to the Commissioner of Internal Revenue for relief, and in no case should the collector refuse to forward a claim for the reason that it was not presented to him within two years after payment.
>
> "Claims for the abatement and refunding of taxes and redemption of stamps, when received at this office, are recorded, and if they are afterwards returned to the collector

> for amendment they should in all cases be returned to this office; even if new claims are prepared, such new claims should be considered as amendments to the original claims and should be inclosed therein. If for any reason the claims are returned to the claimants, claimants should be instructed to return the original claims."

When your petitioner filed its claim for refund on September 22, 1919, for the stamp taxes paid, it amended its informal claim of February 11, 1915, for it will be observed that three of the deeds listed in the refund claim—Mahoning Valley Western R. R. Co., Akron & Chicago Junction R. R. Co., and Central Ohio R. R. Co.—were fully set forth in petitioner's informal claim for abatement filed February 11, 1915. Your petitioner, by its claim for refund, perfected its claim in accordance with the internal-revenue laws and regulations governing the subject-matter of its claim.

The act of May 12, 1900 (31 Statute, 177), relating to the redemption of or allowance for internal revenue stamps provides in part as follows:

> "That no claim for the redemption of or allowance for stamps shall be allowed unless presented within two years after the purchase of said stamps from the Government, excepting documentary and proprietary stamps issued under the act of June thirteenth, eighteen hundred and ninety-eight, which stamps may be redeemed as hereinbefore authorized, upon presentation prior to the first day of July, nineteen hundred and four."

It will be observed that the act in question requires no specified form of application or presentation of a claim. And in the case of Bank of Greencastle *vs.* U. S., 15 Court of Claims, 225, this very point was passed upon on sections 3220 and 3228 of the Revised Statutes, which, as in the Act of May 12, 1900, require no specified form of application. The circumstances in the aforesaid case are as follows:

> "On the 30th of August, 1872, the claimant paid to an internal-revenue collector the sum of $136.55 as a tax on dividends under protest, alleging the assessment to have been illegal. On the 11th of March, 1876, a formal application was made to the Commissioner for a refund, and was returned July 17, 1876, for amendment. A subsequent amended application was made by the claimant and sworn to May 25, 1878, certified by the deputy collector June 1, and forwarded to the Commissioner by the collector June 13, 1878."

In deciding this case, the court said:

> "The statute requires no specified form of application or presentation of a claim. An informal appeal to the Commissioner, which is satisfactory to him and is accepted as such, is a sufficient presentation of a claim to lay the foundation of a more formal application to be made in conformity to the regulation, when required by the Commissioner, as was done in the present case (14th Opinions Atty. Gen., 615).

> "At the time of the payment of this tax the claimant entered a protest against its legality. A protest has never been held by the Commissioner of Internal Revenue as a condition precedent to the right of a claimant to appeal to him and to obtain a refund of taxes illegally assessed and collected. If this protest was in writing and forwarded to the Commissioner, he may have found from its language that it was made as, and was sufficient for, a primary application or presentation of a claim for refund."

It may be contended that no protest was made before the payment of the taxes in question, yet that would have availed this claimant nothing. The Court of Claims, in the case of Charles H. Adams *vs.* The United States, in 1 Ct. Cl., at page 306, has this to say:

> "The payment of an illegal tax is not voluntary though no protest be made, for the collector is bound to collect the tax, and a protest would be unavailing.
>
> "The evidence shows that the claimant protested against the assessment of the tax, and the assessor made return of that fact to the Department. Having been assessed and certified to the collector, he was bound to collect it, and any protest would have been unavailing. The law does not require him to do that which could have been of no effect."

In Johnson and Johnson *vs.* Herold, 161 Fed., page 598, the court said:

"The further point is raised by the defendants that the moneys paid by the plaintiffs for stamps, which they are seeking to recover, were paid without protest and voluntarily, and that therefore the suits must fail. The plaintiffs contend, however, that this question is, as between the parties hereto, *res judicata,* by reason of the judgments entered in the former suits; but assuming, for the purpose of argument, that it is not, I think the evidence shows that the payments were made under protest, and were not voluntary. It is quite impossible to read the evidence upon this point without reaching that conclusion. Even before the act became operative, a representative of the plaintiffs went to Washington with samples of all the articles and preparations manufactured by them, and the question of their liabiiity to the stamp tax was gone over with the Internal Revenue Commissioner, or his deputy. The department decided that the articles here involved were taxable, and wrote a letter to that effect, which came to the plaintiffs through one of the defendants, and from that time on until the act was repealed the liability to taxation of these various articles and preparations was one of active and constant argument and dispute between the plaintiffs and the Revenue Department, and defendants. Protests were repeatedly made by the plaintiffs, both verbally and in writing, to the Revenue Department and to the collectors, and the plaintiffs were informed by the department that, if the articles which were declared by

the department to be subject to taxes were sold or exposed for sale without the requisite stamps, such action would be at their peril, and that all such unstamped articles would be seized and confiscated, and as a matter of fact there is evidence that some were so seized. Under the circumstances, it was wholly unnecessary for the plaintiffs to enter a protest with the collectors each time they purchased a stamp or stamps. Indeed, such action would have been well-nigh impossible, since they were constantly using stamps in large quantities, not only upon the disputed articles, but also upon very many other articles about which there either never had been any dispute, or, if there had, it had been adjusted. There was never at any time any doubt between the plaintiffs and the department and defendants as to which of their preparations the plaintiffs claimed were not, and which the department claimed were, subject to stamp duty, and it was to these disputed articles that the protests, verbal and written, were directed, and were understood by the defendants to be directed.

"Two cases are specially relied upon by the defendants to support their position viz.: Chesebrough *vs.* United States, 192 U. S., 253; 24 Sup. Ct., 262; 48 L. Ed., 432 and United States *vs.* New York & Cuba Mail Steamship Co., 200 U. S., 488; 26 Sup Ct., 327; 50 L. Ed., 569, but they do not seem to me to control the question under consideration, or indeed to have much bearing upon it.

"In the first case mentioned, Chesebrough purchased stamps from a collector of internal revenue without intimating the purpose for which they were purchased, and without any protest made, or notice given at the time, that the purchaser claimed that the purchase was made under duress, and that the law requiring their use was unconstitutional. Under such circumstances, it was accordingly held that the purchase was purely voluntary, while in the other case substantially all that was decided that can be claimed to be pertinent appears in the second syllabus, in the following language:

" 'Affixing stamps required by the war revenue act of 1898 to the manifest of a vessel in order to obtain the clearance required by section 4197, Rev. St. (U. S. Comp. St. 1901, p. 2840), without presenting any claim or protest to the collector of internal revenue from whom the stamps are purchased, or to the collector of the port from whom the clearance is obtained, is not a payment under duress, but a voluntary payment, and the amount paid for the stamps cannot be recovered either on the ground of the unconstitutionality of the provisions of the war revenue act, requiring the stamps to be affixed, or under Act May 12, 1900, c. 393, 31 Stat., 177 (U. S. Comp. St. 1901, p. 2276), providing for the redemption of stamps used by mistake.' "

It will be observed that in the instant case appellant had written its protest against the imposition of the stamp taxes which emphasizes the sufficiency

of protest as much or more than in Johnson & Johnson *vs.* Herold, supra.

POINT 2.

APPELLANT COMPLIED WITH SECTION 3226 REVISED STATUTES.

The Court of Claims erred in holding that appellant did not comply with Section 3226 Revised Statutes as its amended claim was duly presented under the internal revenue laws and regulations of the Internal Revenue Bureau. Section 3226 Revised Statutes provides as follows:

> "no suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected * * * until appeals shall have been duly made to the Commissioner of Internal Revenue, *according to the provisions of law in that regard* * * * and a decision of the Commissioner has been had therein; *Provided,* That if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought * * *."

The Court of Claims said in the Rock Island, Arkansas and Louisiana Railroad Company, 54th Court of Claims, p. 34, which case was affirmed by this court in 254 U. S., 141:

> "A cause of action for the erroneous or illegal assessment or collection of internal-

> revenue tax does not accrue before payment of the tax. An appeal for the abatement of the assessment may be authorized by law, but it is voluntary, and its rejection affords no basis for relief. The appeal for a refund, which can only be made after payment of the amount sought to have refunded, is not only authorized but is required, as a condition precedent to the maintenance of an action in any court for the recovery of the tax."

It will be noted that appellant shows by its petition (Rec., p. 1) that it did in the instant case exactly what the Court of Claims said must be done in the aforesaid excerpt from its decision. Appellant filed its suit as shown by the record, page 3, after rejection of its refund claim by the Commissioner of Internal Revenue as prescribed by Revised Statutes Section 3226.

POINT 3.

ROCK ISLAND, ARKANSAS & LOUISIANA RAILROAD COMPANY, 254 U. S, 141, DISTINGUISHED FROM CASE AT BAR.

The Court of Claims in its decision cites the case of Rock Island, Arkansas and Louisiana Railway Company *vs.* United States, 254 U. S., 141, as applicable in sustaining demurrer in the instant case. This is clearly error. The aforesaid case was an appeal from the Court of Claims (54th Court of

Claims 22) and in the decision of the Court of Claims at page 32 the cause of action is stated as follows:

> "Seeking to found its claim upon a law of Congress, it is necessary that the plaintiff show a compliance with that law. What the plaintiff in the instant case did was to apply to the Commissioner for an abatement of the assessment, using for that purpose Form 47 prescribed by the regulation. That application was rejected. Thereafter the plaintiff paid the tax to the collector, and without securing a decision by the Commissioner upon an appeal for a refund, and without invoking any action by him after payment, action was brought in this court nearly two years after the payment of the tax."

Contrast the aforesaid with the instant case and it will be observed that the facts in the adjudicated case are not identical with the case at bar and therefore not relevant in deciding the issues herein.

Appellant states in its petition that it filed its informal claim in abatement on February 11, 1915, in the Bureau of Internal Revenue and stated that no stamp tax should apply to the tendered deeds asked for a ruling of the Commissioner of Internal Revenue (Rec., p. 2), and the Commissioner of Internal Revenue on February 25, 1915, rejected the informal claim in abatement and held that the stamp tax should apply (Rec., p. 3). Upon the rejection of the informal claim in abatement appellant paid

the stamp tax on the deeds tendered and ten other deeds as it had no other alternative (Rec., p. 3).

The Court of Claims in the Rock Island, Arkansas and Louisiana Railroad Company at page 28 held:

> "Inasmuch as the statute authorizes the Commissioner to 'remit' the tax, it may be assumed that the regulations providing for an application to abate the tax find sufficient support in the authority granted to remit. No remedy, however, is provided in the event the Commissioner erroneously refuses to remit or abate the tax. Section 3224 provides that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court. The party assessed must accordingly pay the tax, and he may then appeal to the Commissioner for the refunding of it."

Appellant contended before the Commissioner of Internal Revenue that its claim for refund filed September 22, 1919 (Rec., p. 1), was a proper amendment to its informal claim in abatement under the internal revenue laws and regulation of the Bureau of Internal Revenue (Rec., p. 3). In the Rock Island, Arkansas and Louisiana Railroad Company case there was no claim for refund filed and no effort made to amend the claim for abatement filed by the appellant. The appellant sued without filing a claim for refund whereas appellant in the instant case filed an informal claim in abatement and amended it by a claim for refund and in

all respects complying with the statute and regulations.

It will thus be seen by a reading of appellant's petition that the cause of action herein shows a full compliance with the doctrine laid down by the court in the Rock Island, Arkansas and Louisiana Railroad case while the facts are entirely different than in the adjudicated case.

POINT 4.

THE COURT OF CLAIMS ERRED IN HOLDING SECOND ABATEMENT CLAIM NECESSARY TO BE FILED.

The Court of Claims said:

> "The Commissioner promptly complied with the request and *the plaintiff instead of asking for an abatement of the same thereafter purchased the stamps,* affixed them to the deeds, canceled the same and accepted the ruling of the Commissioner, never seeking in any manner to challenge its conclusiveness until some four years later it discovered in the decision of a case in which it was in nowise concerned there existed a possibility to proceed now as it should have proceeded four years ago."
>
> (Rec., p. 6.)

We think the aforesaid is clearly error as nowhere in the internal revenue laws and the regulations of the Bureau of Internal Revenue nor in the

practice before the Internal Revenue Bureau is it required that a second claim for abatement be filed in this or any other case. No authority is cited by the Court of Claims why this appellant was required to file another claim for abatement. It would have been mere repetition to have done so and the internal revenue laws and regulations do not provide for it. Appellant had already done everything required in its informal claim. It will also be noted that the stamp tax provision of the Act of October 22, 1914 (38 Stat., 745), imposes the assessment of stamp taxes on certain deeds of conveyance without assessment by the Commissioner of Internal Revenue and appellant by its informal claim in abatement tendering the deeds in question to the Commissioner of Internal Revenue and contending that the stamp taxes should not apply under the statute had made an informal claim in abatement under Regulation 14 revised of the Internal Revenue Bureau of the Treasury Department and which was recognized by the Commissioner of Internal Revenue in his letter of February 25, 1915, rejecting the informal claim and holding that the stamp taxes applied.

It has been held that:

> "Even if it were necessary to plead duress or protest the petition or complaint sets forth that the defendant computed the tax under compulsion of the regulations and filed a claim for abatement of the taxes assessed before payment. This complies with every requisite of a payment under protest.

> Chesebrough *vs.* U. S., 192 U. S., 253; 24 Sup. Ct., 262; 48 L. Ed., 432; City of Philadelphia *vs.* Collector, 5 Wall., 720; 18 L. Ed., 614. The Government urges that it is necessary to make a protest at the time of actual payment, but it seems to the court that this would be a useless requirement. The objects of the protest are to define the taxpayer's attitude and to notify the Government thereof. These have been fully accomplished by the objection of the taxpayer when the computation was made and by the filing of his claim."
>
> Greenport Basin & Construction Co. *vs.* United States, 269 Fed., 60.

Replying to that part of the Court of Claims' decision:

> "never seeking in any manner to challenge its conclusiveness until some four years later it discovered in the decision of a case in which it was in nowise concerned there existed a possibility to proceed now as it should have proceeded four years ago,"
>
> (Rec., p. 6.)

it will be observed that this court said in James, Administrator, *vs.* Hicks, 110 U. S., p. 144:

> "The plaintiff in his declaration alleged that he appealed to the Commissioner of Internal Revenue to refund the tax illegally collected and that his appeal was rejected by the Commissioner on January 22, 1879. To this declaration the defendant pleaded that

the appeal to the Commissioner to refund the money exacted was filed in his office on February 8, 1866, and was rejected on May 7, 1866. To this the plaintiff replied that the appeal referred to in the plea was not duly made, and that it was not rejected on its merits, but because it had not been made and certified on proper forms as required by the Treasury regulations; and that afterwards, on Januaury 8, 1868, he made an appeal in due form, which was entertained by the Commissioner, and finally decided and rejected on January 22, 1879. The finding of fact on this issue by the court is as follows:

" 'The issues in fact being tried and determined by the court in this cause upon a stipulation in writing by the parties through their respective counsel, filed under section 649, Revised Statutes of the United States, the court find the facts as proved, under the special plea of the Statute of Limitations, to be that the suit was brought within six months after the final rejection of the plaintiff's appeal made to the Commissioner of Internal Revenue at Washington, the same having been pending before the Commissioner from the time the appeal was perfected on Form 46, according to the provisions of law and the regulations of the Secretary of the Treasury made in pursuance thereof. It is further found that the delay in the consideration of the appeal by the Commissioner after its perfection on Form 46 and the signature of the proper officers required by law was occasioned by the loss of the original papers filed with the depart-

ment by the plaintiff or his attorney, and required by law to be kept there.'

"Judgment was rendered in favor of the plaintiff below, to reverse which is the object of the present proceeding.

"It is alleged as error, in the first place, that the court should have treated the appeal rejected for informality as the basis for determining the time within which the suit ought to have been brought. But that appeal was not so treated by the Commissioner, who rejected it for mere informality and entertained the subsequent appeal, made in proper form, as rightly prosecuted. The latter, in our opinion, was the appeal contemplated by the statute."

James, Administrator, *vs.* Hicks, 110 U. S., 144, 145.

POINT 5.

DEEDS CONTAINED ONLY A NOMINAL CONSIDERATION AND WERE NOT TAXABLE.

The petition alleges:

> "Each of said tendered deeds contained only a nominal consideration and conveyed property of each of the subsidiary corporations to the parent corporation."
> (Rec., p. 2.)

If there were any doubt as to the letter of February 11, 1915, constituting an informal claim, that doubt should be removed by consideration of the circumstances and time when it was made. The

Baltimore and Ohio Railroad Company, the appellant here, was at that time preparing to issue its Refunding and General Mortgage providing for a bond issue limited, except under certain conditions, to the sum of $600,000,000. Among the preliminary transactions that were necessary to be promptly consummated was that of transferring the title to property of various subsidiary companies into the name of the real owner, The Baltimore and Ohio Railroad Company. Under the provisions of the law under which this tax was collectible the deeds for so transferring title could not be properly and legally recorded unless they contained stamps if the same were taxable. Again the statute is a self-assessing statute, and the alternative procedure which the railroad could have taken was, (1) to stamp the deeds and record them and then file a claim for refund, or (2) to file claim in advance of the time for recording that the statute did not assess a tax upon the particular transaction. The effect of the two procedures is exactly the same. Each is a claim that this self-assessing statute imposes no tax upon the particular transaction.

It is respectfully submitted in the face of a decision by the Bureau of Internal Revenue that the tax applied, the Bureau of Internal Revenue could not and certainly ought not to be allowed to take refuge behind the statutes imposing the two-year limitation to avoid a claim for refund upon a subsequent decision of the Bureau of Internal Reve-

nue reversing the earlier decision. While no one would suppose that the Bureau of Internal Revenue would do such a thing purposely, still it leaves the Bureau of Internal Revenue in the position of being able to defeat a perfectly legitimate claim for refund through its failure to correct an erroneous ruling, and the case might well arise where the two-year period would expire simply on account of the length of time it takes to put anything through the Bureau of Internal Revenue. The fairness of this view is emphasized by the provision in the Revenue Act of 1921, Section 1314, as follows:

> "RETROACTIVE REGULATIONS.
>
> "Sec. 1314. That in case a regulation or treasury decision relating to the internal revenue laws made by the Commissioner or the Secretary, or by the Commissioner with the approval of the Secretary, is reversed by a subsequent regulation or treasury decision, and such reversal is not immediately occasioned or required by a decision of a court of competent jurisdiction, such subsequent regulation or treasury decision may, in the discretion of the Commissioner, with the approval of the Secretary, be applied without retroactive effect."

The court will respectfully note that in paragraph five of plaintiff's petition it is stated:

> "The provision of the Internal Revenue Act of October 22, 1914 (38 Stat., 745), relating to deeds of conveyance is identical

with the provisions of the internal-revenue statute of February 24, 1919 (40 Stat., 1057), relating to deeds of conveyance, and the ruling of the acting Commissioner of Internal Revenue of April 18, 1919, relating to deeds of conveyance from subsidiary to parent corporation for a nominal consideration applies with equal force to the Internal Revenue Act of October 22, 1914 (38 Stat., 745), relating to deeds of conveyance." (R., 3.)

"The sections of the 1914 and 1918 statutes as aforesaid are as follows:

Act of October 22, 1914 (38 Statute, 745).

SCHEDULE A.

Conveyance: Deed, instrument, or writing, whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her, or their direction, when the consideration or value of the interest or property conveyed, exclusive of the value of any lien, or encumbrance thereon, exceeds $100 and does not exceed $500, 50 cents; and for each additional $500 or fractional part thereof in excess of $500, 50 cents; *Provided:* That nothing contained in this paragraph shall be so construed as to impose a tax upon an instrument or writing given to secure a debt."

Act of 1918 (Enacted February 24, 1919, 40 Statute, 1057).

SUBDIVISION 7, SCHEDULE A.

Conveyances: Deed, instrument, or writing, whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her, or their direction, when the consideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale, exceeds $100 and does not exceed $500, 50 cents; and for each additional $500 or fractional part thereof, 50 cents. This subdivision shall not apply to any instrument or writing given to secure a debt."

In Mastin *vs.* Mastin, 99 Fed., pages 435-436, the court, in passing upon deeds of conveyance where there is no valuable consideration under the Act of June 13, 1898, on the section "Conveyance" in said act which is identical with the section of conveyance in the Act of October 22, 1914, said:

> "The receiver, Hugh C. Ward, heretofore appointed by the court in the above-entitled cause, on the final decree of the court winding up the administration of said estate, being required to execute a deed of release back to the above-named parties, has submitted to this court for its ruling the question as to whether or not, under the internal revenue laws of the United States, he is required to place upon such deed of release revenue stamps, and, if so, to what extent. The provision of the revenue law is as follows:
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> " 'Conveyance: Deed, instrument, or writing, whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her, or their direction, when the consideration or value exceeds one hundred dollars and does not exceed five hundred dollars, fifty cents; and for each additional five hundred dollars or fractional part thereof in excess of five hundred dollars, fifty cents.'
>
> "Whatever may be said in respect of the controlling words in said section, it clearly enough applies alone to the instance of a

sale and transfer of property to a purchaser between whom something of value invested in and belonging to the grantor passes to the grantee, whereby the grantee receives a benefit capable of estimation in money value. In this case, upon the petition of one of the partners, for the purpose of winding up the co-partnership, the partnership estate was placed in *custodia legis,* and a receiver was appointed solely for the purpose of administration. By the decree of the court granting the injunction and appointing the receiver, the co-partners were required to place their title to the property in the receiver. This was merely for the purpose and convenience of judicial administration. No valuable consideration passed from the receiver to the grantors. Without such order of court, and without such conveyance, by operation of law, under the decree of the court appointing the receiver, the right, title, and interest of the parties passed to, and vested in, the receiver *pendente lite,* which would have enabled the receiver, under the order and direction of the court, to make sales and conveyances of the property. Such deeds by the receiver unquestionably would have required the requisite revenue stamp. The conveyances made by the parties to the receiver, in compliance with the order of the court, were essentially conveyances in *invitum* on the part of the grantors, and were essentially conveyances made by operation of law, solely for the better convenience and purposes of administration *pendente lite.* It is unlike the instance of a

conveyance by the owner of property to a designated trustee to hold in trust for the security of a beneficiary, under which a deed terminating such trust, and revesting the title, 'should be stamped according to the amount required on the trust deed that is released or terminated.' But in the case under consideration the transfer of the title to the receiver was but supplemental and ancillary to the transfer by operation of law under the decree, and was not made for the better security of any designated debt or claim. Therefore, on the final decree of the court, after the purposes of the judicial proceeding were accomplished, the court could have decreed the title thus vested in the receiver back to the copartners, and the title would have revested by simple operation of the decree in them. In such case, there could be no pretense that such reinvestiture constituted a conveyance, within the meaning of the revenue law. The fact that the court, in addition to the decree itself, made the further provision or requirement that the receiver should remise and release to the parties this title taken in *custodia legis,* ought not to produce a different result, in so far as the revenue laws are concerned. In such case no consideration passes from the grantees to the grantor. The receiver receives nothing, and the grantees pay nothing. And, in the judgment of the court, it is not within either the letter or the spirit of said provision of the revenue law that such transfers come within the purview of sales and purchases contemplated by

the act. In such case the receiver has no discretion but to obey the decree of the court. And, as he is but the 'right arm' of the court, he but acts in the retransfer as the instrument of the court; and when the deed is executed the grantees but receive what, in law and equity, is their own, and it would be unconscionable to exact of either a tax upon such deed."

It has been well stated:

> Statutes must have a reasonable construction, and the language must be interpreted with reference to the subject matter and the general course of business to which they relate, and in such manner that the beneficent provisions of remedial laws may not be thwarted by nice technicalities not within the minds of legislators (Wilcox's Case, 95 U. S. R., 661, affirming the judgment of this court in same case, 12 C. Cls. R., 595).
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> Real Estate Savings Bank *vs.* United States, 16 C. Cl., 346; affirmed in 104 U. S., 728.

CONCLUSION.

It is respectfully submitted that the judgment of the Court of Claims should be reversed for the following reasons:

1. The petition states facts sufficient to constitute a cause of action and said cause of action is within the jurisdiction of the Court of Claims.

2. That the statute of limitations in the Act of May 12, 1900 (31 Stat., 177), is no bar to the cause of action.

3. That the deeds were given for a nominal consideration and therefore are not taxable.

Very respectfully,

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